Filed 8/8/19 Safeway Wage and Hour Cases CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SAFEWAY WAGE AND HOUR CASES.	B287004 (JCCP No. 4772)

APPEAL from judgments of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed.

Arias Sanguinetti Wang & Torrijos, Mike Arias, Alfredo Torrijos, and Craig S. Momita, for Plaintiffs and Appellants.

Littler Mendelson, Margaret H. Gillespie, Philip L. Ross, and Kevin Lilly, for Defendants and Respondents.

INTRODUCTION

The 21 appellants (store managers, first assistant store managers, and second assistant store managers) sued The Vons Companies, Inc., and/or its parent company, Safeway, Inc. (collectively, respondent), alleging they were misclassified as exempt employees and wrongfully denied overtime. The trial court granted respondent's motions for summary judgment, finding the executive exemption applied to each appellant as a matter of law. Appellants challenge only the trial court's conclusion that no triable issues of material fact existed as to whether they spent more than 50 percent of their work days engaged in exempt, as opposed to nonexempt, duties. Their joint opening brief, however, is inadequate, even for de novo review.[1] Accordingly, appellants have forfeited their issue; and we affirm the judgments without addressing the merits.

FACTUAL AND PROCEDURAL BACKGROUND

The Safeway Wage and Hour Cases, Judicial Council Coordination Proceeding (JCCP) No. 4772, have been proceeding for a number of years. Pertinent background facts and applicable law are set forth in two published decisions: *Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795 (*Heyen*) and *Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440 (*Batze*). Briefly, respondent classifies its store managers, first assistant store managers, and second assistant store managers as exempt and does not pay them overtime. More than 200 individuals have disputed their exempt status and sued respondent to recover overtime payments.

Relying on the then-recent *Batze* decision, respondent filed motions for summary judgment against 35 plaintiffs seeking a determination that they were properly classified and exempt from California's overtime laws. The coordination trial judge accepted the parties' stipulation for the service and filing of the moving and opposing papers. Respondent filed a master memorandum of points and authorities and master separate statement, along

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[1] Appellants did not file a reply brief.

with points and authorities and separate statements for each plaintiff. Plaintiffs' opposition papers included a master memorandum of points and authorities and master responsive separate statement as well as individual responsive separate statements.[2] The overarching issue was whether each employee spent more than half of his or her work day performing exempt, versus nonexempt, duties.

The motions were drafted to fit the framework of *Batze*. Respondent primarily supported the motions with appellants' deposition testimony.

Appellants' declarations were virtually identical, with only dates, store locations, and job titles individualized. For example, paragraph five in each declaration stated in pertinent part, "I spent well over half my time each week performing nonexempt tasks; that is, the same or similar physical work routinely done by non-exempt hourly employees such as checking out customers, stocking shelves, bagging groceries, lifting, hauling and carrying product . . . ." Paragraph 15 advised, "Many of the exempt or managerial tasks that I performed such as cash register overrides or superior service huddles sometimes took me mere seconds or minutes of my day, and some managerial tasks were only performed weekly, monthly, or even yearly."[3] Paragraph 16 added in part, "When I checked or stocked, I did not perform these tasks because they were helpful in supervising the employees or because it contributed to the smooth functioning of the store. . . . The reason I did this work was not managerial in nature, but rather because the stores were severely understaffed."

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[2] The sole exception is Teri Malone (L.A. Super. Ct. No. BC399812), who did not file a responsive statement. Although Malone was identified as an appellant, her counsel confirmed at oral argument that she is not pursuing the appeal.

Appellant Richard LaRoque apparently filed a responsive separate statement, but it is not included in appellants' appendix.

[3] Appellant Chaparro included this statement, even though he held the position of first assistant manager for only four months.

The individual responsive separate statements included a number of boilerplate responses, most without identifying any supporting evidence or with only a shorthand, e.g., "Plaintiff's Decl., ¶ 4."[4]

The motions were argued and taken under submission on September 21, 2017. Within one week, the trial court issued comprehensive written rulings, totaling 151 pages. The trial court detailed the admissible evidence presented by both sides in every motion. In each case, the trial court determined respondent "made a prima facie showing of the nonexistence of a triable issue of fact as to whether [the employee] was 'primarily engaged' in exempt work," thereby shifting the burden to the employee to "raise[] a triable issue of material fact as to whether he [or she] spent more than 50% of his [or her] time performing non-managerial functions." The trial court noted the boilerplate language in the appellants' declarations. Where the

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[4] For example, respondent's separate statement included the following, each supported by a specific citation to an appellant's deposition testimony:

Appellant Beeler: "19. During his time as [second assistant store manager], Beeler reviewed the call sheet upon arriving at the store to determine who was on staff in case a safety issue arose."

Appellant Chaparro: "15. Chaparro oversaw training."

Appellant Copeland: "5. Copeland would have discussions with the night crew to provide direction as needed."

Responsive separate statements by Beeler and Chaparro were prefaced with, "Disputed, irrelevant and immaterial." Copeland did not indicate whether he disputed the statement. Each response then included, in pertinent part: "Under Wage Order 7 'first and foremost' the work actually performed is examined. Assuming this is an exempt task(s), there's no 'quantum of time' evidence presented. . . . Therefore, how much time [appellant] spent performing this task(s) is a triable issue of fact. This presents another triable issue under Wage Order 7." None of the appellants identified any evidence to support the statement.

Each separate statement of undisputed facts included the individual appellant's annual salary range, as confirmed through payroll records. Appellants' invariable response was, "Undisputed that [appellants] earned twice the minimum wage. [¶] Disputed as irrelevant and immaterial. Based on scheduled hours, [appellant] made less per hour than what hourly journeyman food clerks make per hour." These responses were all supported by the identical paragraph 11 in each appellant's declaration.

declaration contradicted an appellant's deposition testimony, the trial court disregarded the declaration. The trial court concluded 13 plaintiffs raised one or more triable issues of material fact and denied the motions. The summary judgment motions were granted as to the 21 appellants.[5]

DISCUSSION

I. Wage and Hour Law – Executive Exemption

Unless an exemption applies, California employees must be paid at overtime rates when they work more than eight hours in one workday or more than 40 hours in one workweek. (Lab. Code, §§ 510, 515; *Batze, supra,* 10 Cal.App.5th at p. 471.) Exemptions from the overtime requirement are set forth in Industrial Welfare Commission (IWC) wage orders, a number of which expressly incorporate parallel federal regulations. (*Heyen, supra,* 216 Cal.App.4th at pp. 818-819.) However, when state and federal labor laws diverge, and the IWC affords greater protection to California employees, we do not rely "on federal regulations or interpretations to construe state regulations." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798 (*Ramirez*).)

These coordinated proceedings involve the executive exemption in IWC Wage Order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070 (Wage Order 7)), which regulates wages, hours, and working conditions in the mercantile industry. (*Batze, supra,* 10 Cal.App.5th at pp. 472-473; *Heyen, supra,* 216 Cal.App.4th at pp. 816-817.) Pursuant to Wage Order 7, an employer is not required to pay overtime to employees whose duties qualify them for an executive exemption. (Cal. Code Regs., tit. 8, § 11070, subd (1)(A).)

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[5] All the appellants filed their lawsuits in the Superior Court of Los Angeles County. Appellants are Brett Beeler (BC406862), Arnold Chaparro (BC349970), Stanley Copeland, Jr. (BC346977), Steven Costa (BC472655), Patricia Emerson (BC349970), Raymond Garcia (BC345003), William Gillette (BC348731), Jason Glavin (BC 348090), Chad Harris (BC399811), Michael Kong (BC355418), Richard LaRoque (BC344016), Shayla Lee (BC491515), Kevin Lesley (BC416450), Shena Magno (BC428657), Debbie Mahony (BC344016), Timothy Marsh (BC343337), Michelle Minahan (BC399810), Raymond Ortiz (BC399810), Bruce Rechsteiner (BC399811), Danny Rogers (BC521843), and Lance White (BC472655).

Criteria for this exemption are as follows: The employee must be "primarily engaged in duties which meet the test of the exemption," i.e., activities that constitute exempt, rather than nonexempt, work, as construed in applicable federal regulations. (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e).) The duties must involve "management of the enterprise in which he/she is employed," the supervision or directing of the work of two or more employees, regular exercise of discretion and independent judgment, and "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing [or] advancement and promotion [of employees] . . . will be given particular weight." (*Id.* at § 11070, subd. 1(A)(1)(a)-(d).) Finally, the employee must earn at least twice the minimum wage. (*Id.* at § 11070, subd. 1(A)(1)(f).)

"'Primarily,'" as used in the requirement that an employee be "primarily engaged in duties which meet the test of the exemption," "means more than one-half the employee's work time." (Cal. Code Regs., tit. 8, § 11070, subds. 1(A)(1)(e), 2(K).) The "regulation takes a purely quantitative approach, focusing exclusively" on the percentage of time an employee spends performing exempt duties. (*Ramirez, supra,* 20 Cal.4th at p. 797.)

"[E]xempt work includes not only the tasks necessary for the actual management of a department and the supervision of its employees, but also tasks that are 'closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities.'" (*Heyen, supra,* 216 Cal.App.4th at p. 819.) In any organization or industry, managerial staff may routinely perform both exempt and nonexempt duties, sometimes at the same time. California, however, does not recognize a concurrent or hybrid label for "activities that have both 'exempt' and 'nonexempt' aspects." (*Id.* at p. 822.) Duties must be categorized "as either 'exempt' or 'nonexempt,' based on the purpose for which" the employee undertakes them. (*Id.* at p. 826.) The same task, performed by a manager at different times for different reasons, may be exempt one day and nonexempt another, depending on how "'directly and closely related [it is] to the performance of management duties.'" (*Id.* at p. 820.) As this court has held, "[u]nderstanding the manager's purpose in engaging in such tasks, or a task's

role in the work of the organization, is critical to the task's proper categorization." (*Batze, supra,* 10 Cal.App.5th at p. 474.)

The workweek is "the significant period for determining exempt status." (*Batze, supra,* 10 Cal.App.5th at p. 478.) But in applying the quantitative test to determine the percentage of the workweek that an employee spends on exempt duties, courts are entitled to "make reasonable inferences about [an employee's] activities during the relevant period based on his or her activities in earlier and later periods, particularly where there is nothing to suggest the employee's duties and responsibilities changed significantly." (*Id.* at p. 479.)

In *Batze*, for example, the trial court determined the three appellants, who were assistant store managers for respondent, qualified for the executive exemption and were not entitled to overtime. In affirming, this court held the trial court properly "drew reasonable inferences from the . . . evidence that established how [the assistant managers] spent the majority of their time." (*Batze, supra,* 10 Cal.App.5th at p. 445.) We also outlined the trial court's analytical steps: "Preliminarily, the [trial] court rejected the contention that because respondent bore the burden of proof, 'it must produce evidence of [the] tasks [appellants] performed during every workweek for which liability is in question.' Instead, the [trial] court ruled that respondent could properly rely on logical inferences or evidence from which extrapolation was possible. The [trial] court acknowledged it should not apply data directly pertinent to one appellant to another, but found it 'proper to consider a store's time records for one [appellant's] so-called typical day in determining [the] time the same person spent on other days in the same store, or even in stores of similar size and characteristics.'" (*Id.* at p. 462, fn. omitted.)

In addition to quantifying "the 'work actually performed by the employee during the . . . workweek,' [courts also must evaluate] the 'employer's realistic expectations and the realistic requirements of the job.' (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e).)" (*Heyen, supra,* 216 Cal.App.4th at p. 828.) This aspect requires courts to consider whether the time an employee spends on nonexempt duties "diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these

expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra,* 20 Cal.4th at p. 802.) The employer bears the burden to prove that both its expectations and the job's requirements are realistic. (*Batze, supra,* 10 Cal.App.5th at p. 461.)

Overtime exemptions "'are narrowly construed'" and must be raised by the employer as affirmative defenses. (*Batze, supra,* 10 Cal.App.5th at pp. 461-462; *Heyen, supra,* 216 Cal.App.4th at p. 817.) The employer has the burden of proof, and the executive exemption applies only if the employer proves that all criteria are met. (*Heyen,* at p. 817.)

II. Summary Judgment

Whether an employee satisfies the criteria for an executive exemption typically presents a question of fact. (*Heyen, supra,* 216 Cal.App.4th at p. 817.) The question may be resolved as a matter of law by way of summary judgment if the employer establishes there are no triable issues of material fact as to each criterion. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).)

A party seeking summary judgment must state the material facts in a separate statement, and the opposing party is required to respond in the same format. (Code Civ. Proc., § 437c, subd. (b).) The moving and responsive separate statements also must identify the supporting admissible evidence. (*Ibid*.)

The trial court's analysis begins with the moving party's separate statement. As our colleagues in Division Seven of this District summed it up: "Facts not contained in the separate statement do not exist." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Sumitomo Bank*).) First, the trial court determines whether the moving party has made "a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In this regard, the trial court may consider all "direct, circumstantial and inferential evidence" presented by the moving party. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83.) "A prima facie showing is one that is sufficient to support the position of the party in question. . . . No more is called for." (*Id.* at p. 851.)

A moving party that satisfies this burden "causes a shift, and the opposing party is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, at p. 850.) Once the moving party has caused the burden to shift, the opposing party cannot simply stand on its pleadings, but must populate the responsive separate statement with admissible evidence that demonstrates the existence of one or more triable issues of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) A responsive separate statement that ignores or goes beyond the moving party's asserted undisputed facts or consists only of arguments or legal conclusions concerning those facts is insufficient to create a triable issue of material fact.[6] (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 479.)

When a trial court grants summary judgment, it must, "by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The court shall also state its reasons for any other determination." (Code Civ. Proc., § 437c, subd. (g).)

III. Appellate Procedures and Standard of Review

Error by the trial court is never presumed. (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260 (*Silva*).) Appellants have the burden to demonstrate prejudicial error, even if they "did not bear the burden in the trial court." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.)

We review summary judgments de novo. (*Aguilar, supra,* 25 Cal.4th at p. 860.) Although this is an expansive standard, our review is limited to the issues that appellants identify and adequately brief. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368.) Additionally, de novo review does not require a reviewing court "to cull the record for the benefit of the appellant in order to attempt to uncover the

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[6] See footnote 4.

requisite triable issues." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.)

To ensure fairness to all parties, appellants must comply with the rules of appellate procedure, including the requirement that they provide a balanced and complete summary of the significant facts, with appropriate citations to the record. (*Silva, supra,* 7 Cal.App.5th at p. 260; Cal. Rules of Court, rule 8.204(a).) This duty "'grows with the complexity of the record.'"[7] (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) An appellant's brief that consists only of unsupported fact statements and ignores evidence presented by respondent does not afford a reviewing court an opportunity to evaluate the appeal on its merits. (*Silva*, at p. 261.) Accordingly, reviewing courts may disregard all unsupported arguments. (*Sumitomo Bank, supra,* 17 Cal.App.4th at p. 979.)

IV. Analysis

Only one element of the executive exemption is implicated in this appeal–the requirement that the employee be "primarily engaged" in exempt, as opposed to nonexempt and nonmanagerial, duties more than 50 percent of the time. (Cal. Code Regs., tit. 8, § 11070, subd. 1(A)(1)(e).) Appellants contend respondent failed to make a prima facie showing that no fact issues exist as to whether they were each "primarily engaged" in exempt work. This failure, appellants assert, meant the burden never shifted to them to raise a triable issue of material fact and precluded the trial court from granting respondent's motion for summary judgment.[8]

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[7] The record here is complex by any standard–the parties' appendices exceed 10,000 pages.

[8] Appellants' argument on the issue is succinct: "[Respondent's] motions for summary judgment, however, failed to present any evidence which would allow the trial court to quantify how [appellants] spent their time. [Respondent] provided no evidence of the actual tasks [appellants] performed in any given workweek -- let alone *each* workweek -- or of the amount of time [appellants] spent on each task. Nor did [respondent] present any evidence to allow the Court to determine the percentage of their work time that [appellants] spent on exempt tasks. Such evidence would necessarily include,

To the extent appellants contend respondent was required to present evidence of the tasks they performed during every workweek of every appellant's tenure, the argument fails. (*Batze, supra,* 10 Cal.App.5th at pp. 477, 478 [employer's evidence need "not cover in week-by-week detail all periods in which [employees] worked"; court may make "reasonable inferences" based on evidence as to how much time employees spent on exempt tasks].) To the extent appellants assert respondent did not present a prima facie case that shifted the burden to them, appellants forfeited the issue by not complying with the basic rules of appellate procedure.

We cannot evaluate appellants' argument without first considering the evidence presented to the trial court. (*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 572 ["Just as a theater critic must see the play before writing a review, judges must carefully consider the evidence before deciding a case"].) But appellants' brief fails to summarize the evidence or advise this court where the evidence can be found. Appellants' two-paragraph statement of facts does not include a single reference to any evidence respondent presented. (*Silva, supra,* 7 Cal.App.5th at p. 260.) Instead, appellants support their few fact assertions with references to only five pages in an extensive record—and all of them are appellants' own separate statement of disputed material facts. As indicated in footnote 4, *ante*, the only "supporting evidence" on these pages are shorthand references, e.g., "Plaintiffs' Decl. ¶ 4."

The trial court's written rulings were detailed and in full compliance with Code of Civil Procedure section 437c, subdivision (g). They could have

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in addition to the tasks' nature and the time spent on them, the number of hours [respondent] worked each week so as to give the Court a denominator to calculate a percentage. [Respondent] wholly failed to provide this necessary evidence. Accordingly, the motions for summary judgment should have been denied in their entirety based on [respondent's] failure to meet their burden of production."

Appellants' conclusion is equally concise: "Here, because [respondent] failed to present evidence of how [appellants] spent their time each workweek on exempt versus non-exempt tasks, [they] failed to meet their burden of production and their motions for summary judgment should have been denied."

provided a blueprint for appellants' statement of facts and arguments. However, other than acknowledging their existence, appellants ignore them.

Appellants' brief is "in dramatic noncompliance with appellate procedures." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4 [a separate statement "*refers* to evidence," but is not evidence itself; citing one's own separate statement, when one contends facts are in dispute, is of no assistance to the reviewing court].) Without a fair recitation of the evidence, this court could address the merits of this appeal only by supplying our own arguments based on evidence we unearthed from a voluminous record. We decline to do so. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) Appellants forfeited their challenge to the summary judgments. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [reviewing courts are not "backup appellate counsel"].)

DISPOSITION

The judgments are affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

MANELLA, P. J.

WILLHITE, J.

*Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.